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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 642.

KANSAS CITY TRANSIT, INC.,
Petitioner,

vs.

KANSAS CITY TERMINAL RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION.

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JURISDICTION.

The jurisdiction of this Court is not properly invoked under 28 U.S.C., Sec. 1257 (3), as will be shown more fully under "Argument", because no substantial federal question was properly presented to or decided by the Missouri Supreme Court.

STATEMENT OF THE CASE.

Petitioner's statement fails to point out that in neither its pleadings (R. 26-34), its motion for new trial (R. 193-7) nor its briefs before either the Kansas City Court of Appeals or the Missouri Supreme Court was the validity of the municipal ordinances involved in this case "drawn in question" on the ground of being repugnant to the Constitution of the United States, nor were any alleged rights, privileges or immunities of petitioner "specially set-up or claimed under the Constitution * * * of the United States." The sole reference in this record to any supposed federal question is found on page 7 of Petitioner's "Motion and Suggestions for Rehearing" filed in the Missouri Supreme Court, where it is stated:

> "The ordinance, as so construed, violates the 14th Amendment to the Constitution of the United States giving to all persons the equal protection of the laws, in that Transit must pay costs and maintenance not paid by its competitors."

ARGUMENT.

The Petition admits that the question presented and decided by the Missouri Supreme Court "was relatively simple, requiring the application of the general law of construction of contracts to the franchise ordinances * * *" (Petition, p. 10). This Court will not review anything that the state court has not decided. *Walters* v. *City of St. Louis*, 347 U.S. 231; *Pagel* v. *MacLean*, 283 U.S. 266; *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430. Since the sole basis of the Missouri Supreme Court's decision was the construction of municipal franchise ordinances and of a contract between the parties, there is no

substantial federal question presented to this Court by the Petition. *Louisville & Nashville R. Co.* v. *Louisville*, 166 U.S. 709.

Neither was the asserted federal question raised at the proper point before the state courts to entitle Petitioner to review by this Court. Under Missouri law, a constitutional question, state or federal, must be raised at the earliest opportunity and preserved throughout for appellate review; raising a federal constitutional question in a motion for rehearing after a decision by the Missouri Supreme Court is too late. *City of St. Louis* v. *Butler County*, 358 Mo. 1221, 219 S.W.2d 372, 376-380; *State ex rel. Kirks* v. *Allen*, Mo. Sup., 250 S.W.2d 348, 350; *Record Newspaper Co.* v. *Industrial Comm'n.*, Mo. Sup., 340 S.W.2d 613, 614.

Such a state procedural rule is a valid exercise of state power. *Williams* v. *Georgia*, 349 U.S. 375, 382-3, and since Petitioner did not comply with a reasonable Missouri procedural requirement in raising a federal question, this Court should decline to exercise jurisdiction. *Mutual Life Insurance Co.* v. *McCrew*, 188 U.S. 291, 309; *Bailey* v. *Anderson*, 326 U.S. 203, 206-7.

Even if a federal question had been timely raised by Petitioner and actually decided by the Missouri Supreme Court, the issue in this case is not of sufficient importance to justify the exercise of this Court's jurisdiction. The controversy here is a local one, involving the construction of a franchise for a metropolitan transit system. The Missouri Supreme Court's opinion (*Kansas City Terminal Ry. Co.* v. *Kansas City Transit, Inc.*, Mo. Sup., 359 S.W.2d 698, 702-5) cites opinions by the courts of several states involving the basic question presented here, *i. e.*, whether a franchise reference to "street railways" or to "streetcars"

includes other and different types of transportation. In none of these cases has it ever been asserted that important federal questions are involved, and the Missouri Supreme Court's decision as to the "reasonable construction" (359 S.W.2d at 706) to be given the franchises and contract in question do not present a substantial federal issue justifying review by this Court.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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